United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1866

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United States Court of Appeals

For the Second Circuit.

P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

BOLIVAR IRIZARRY, *et al.*,
Defendants,

BOLIVAR IRIZARRY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

METRICK & OSTROW,
Attorneys for Defendant-Appellant,
233 Broadway,
New York, N. Y. 10007
BA 7-3620.

Of Counsel:
SEYMOUR OSTROW,
STEPHEN GILLERS.

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BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a decision of Hon. Mark A. Costantino refusing to vacate appellant's guilty plea. Appellant claims the plea was taken in violation of Rule 11 F.R.Cr.P. 18 U.S.C. §2255.

ISSUE PRESENTED

Does the record of the proceeding at which appellant entered a guilty plea show, as required by Rule 11 F.R.Cr.P., that the plea was entered knowingly and with an understanding of the charge and that there was a factual basis for the plea?

STATEMENT OF THE CASE

On January 29, 1973, the appellant entered a guilty plea to violating 18 U.S.C. §§841 and 846. The following relevant colloquy occurred between the Court and the appellant.

THE COURT: Now, the charge to which you are pleading guilty, under the United States Code is a charge of conspiracy.

Now, you must tell this Court in your own words, what conspiracy you say you committed?

DEFENDANT IRIZARRY: Well, I know I was - that I was supposed to pick up at the time -

THE COURT: What's that?

DEFENDANT IRIZARRY: I knew what I was going to pick up. That it was cocaine.

THE COURT: You were going to pick up cocaine?

DEFENDANT IRIZARRY: Right.

THE COURT: Of course, you can't conspire with yourself.

DEFENDENT IRIZARRY: No.

THE COURT: In order to conspire, you have to have somebody else to conspire with. Is that true?

DEFENDANT IRIZARRY: Yes.

THE COURT: Was there anyone else that you were working with in this agreement?

DEFENDANT IRIZARRY: No. I was told by someone else to pick up that package.

THE COURT: You were told by someone else to pick up that package?

DEFENDANT IRIZARRY: Yes.

THE COURT: And as a result of that conversation with someone else, you then did pick up the package?

DEFENDANT IRIZARRY: I went to pick it up and I was caught before I picked it up.

THE COURT: What's that?

DEFENDANT IRIZARRY: I was caught by the Federal agents.

THE COURT: You were caught. But you went with the -

MR. STECHEL: Could we first -

THE COURT: From whom?

DEFENDANT IRIZARRY: This fellow name' at the bar -

MR. STECHEL: From whom did you pick up the cocaine?

DEFENDANT IRIZARRY: I went to a hotel room. The guy - Valenzuela. That's the name.

The subsequent judgment of conviction incorrectly stated that the appellant had been convicted of violating 18 U.S.C. §§846 and 955 (illegal importation). This error has been corrected under Rule 36 F.R.Cr.P. Still, it is important to the ensuing discussion.

Two weeks earlier, a codefendant, Mr. Valenzuela-Correa, had entered a guilty plea before Judge Costantino to illegal importation. At that time, the following discussion occurred:

> **DEFENDANT CORREA:** When I arrived at the airport I was detained by the police, who found me with the importation of contraband, cocaine.
>
> **THE COURT:** Did he know at the time that he had cocaine on his person?
>
> **DEFENDANT CORREA:** No, I thought I was carrying marijuana.
>
> **THE COURT:** In any event, he was carrying a drug into the United States. Does he have a license to carry a drug into the United States?
>
> **DEFENDANT CORREA:** No.
>
> **THE COURT:** In any event, he agreed to carry a drug into the United States; is that right? And this drug turned out to be cocaine.
>
> **DEFENDANT CORREA:** Yes.
>
> **THE COURT:** And was he involved as the count says with the other two persons named therein?
>
> **DEFENDANT CORREA:** Yes.
>
> **THE COURT:** On an agreement to bring it into this country?
>
> **DEFENDANT CORREA:** Yes, I brought it in.

In his opinion, the Court below relies on this earlier plea to support the requirement that the record reflect a factual basis for the plea. Wrote the Court:

> On January 15, 1973, a codefendant, Jose Valenzuela-Correa, pleaded guilty and admitted his involvement with the petitioner and another codefendant. (Op. p. 3.)

In addition to the colloquy at the time of both appellant's plea and Mr. Valenzuela-Correa's plea, the Court below relied on appellant's pre-plea affidavit in support of discovery and "arguments" (apparently of counsel) in support of a motion for a reduction in sentence. (Op. p.4.)

ARGUMENT

APPELLANT'S GUILTY PLEA WAS ACCEPTED IN VIOLATION OF RULE 11 F.R.Cr.P. BECAUSE IT DOES NOT APPEAR ON THE RECORD AT THE TIME THE PLEA WAS ACCEPTED (1) THAT THE PLEA WAS ENTERED KNOWINGLY WITH AN UNDERSTANDING OF THE CHARGE AND (2) THAT THERE IS A FACTUAL BASIS FOR THE PLEA.

Rule 11 F.R.Cr.P. requires that the trial judge establish on the record at the time of the plea that there is a factual basis for the plea and that it was

entered knowingly and with an understanding of the charge. McCarthy v. United States, 394 U.S. 459 (1969); Manley v. United States, 432 F.2d 1241, 1244 (1970); United States v. White, 483 F.2d 71, 73 (5th Cir. 1973).

In Manley, this Court said that the trial judge

> must personally question the defendant at the time of pleading about the defendant's knowledge of the nature of the charge and the consequences of the plea. Further, he must demonstrate on the record that he has satisfied himself that there is a factual basis for the plea.

Only with regard to pleas taken before McCarthy did the Manley Court allow Rule 11's requirements to be satisfied by reference to the entire record:

> With respect to pleas of guilty taken prior to April 2, 1969, we construe the holdings of McCarthy and Halliday not to require any further inquiry into whether the judge in accepting the plea of guilty had satisfied himself that there was a factual basis for the plea if it is apparent in the record of the case that there was a factual basis for the plea which was known to the judge who imposed sentence.

McCarthy also emphasized the importance of satisfying Rule 11 on the record at the time of plea:

> There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him. (394 U.S. at 470; emphasis in original.)

See also Santobello v. New York, 404 U.S. 257, 261 (1971) (Court is required to "develop, on the record, the factual basis for the plea...") (Emphasis in original.)

"Rule 11 requires strict compliance with its mandates." Smith v. United States, 319 F.Supp. 1359, 1360 (D. Vt. 1970) aff'd without op. 455 F.2d 1406 (2d Cir. 1972). "A failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." United States v. Cantor, 469 F.2d 435, 437 (3d Cir. 1972).

This case illustrates the importance of strict compliance with Rule 11. It seems obvious that the Court below was questioning the appellant in the belief that he was pleading guilty to conspiracy to illegally import, not conspiracy to possess and distribute. The judgement of conviction says that appellant conspired "to bring and possess on board an aircraft arriving in the U.S.

a quantity of Cocaine Hydrochloride, a Schedule II narcotic drug substance, such narcotic drug controlled substance not being part of the cargo entered in the manifest and not being a part of the official supplies of such aircraft." Further, the lower court relies in its opinion on the earlier plea of a codefendant and his implication of appellant. But at that earlier plea, the codefendant implicated appellant in an illegal importation. Appellant contends that the record indicates that the plea the Court "accepted" may not have been the plea that was intended to be given. This question would not have arisen had the lower Court strictly followed Rule 11.

Appellant, on the record, denied participation in a conspiracy. Still, there was no effort to explain "what basic acts" would have had to have been proved to establish guilt of conspiracy or to examine the relationship "between the law and the acts" charged. McCarthy at 467. The Court should "explain the meaning of the charge and what basic acts must be proved to establish guilt." Woodward v. United States, 426 F.2d 959, 962 (3d Cir. 1970.) Cf. United States v. Purin, 486 F.2d

1363, 1369 (2d Cir. 1973); United States v. Santore, 290 F.2d 51, 78-9 (2d Cir. 1960); United States v. Aviles, 274 F.2d 179, 189-90 (2d Cir. 1960); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir. 1959).

At least where participation in the very crime being charged - here, conspiracy - is denied, the plea should not be accepted unless this required explanation is given. In United States v. Cantor, supra., the Court invalidated a plea where the record did not show "that the court correctly stated to [the defendant], or that he truly understood, the elements necessary to prove the conspiracy charged...." Id. at 438.

Further, there is no evidence in the record of another essential element of the crime which appellant pled guilty to - distribution. The plea record indicates only that appellant admitted going to a motel to pick up a controlled substance and was arrested before he did so. United States v. Untiedt, 479 F.2d 1265, 1266 (8th Cir. 1973).

For these two reasons, then, the failure to establish on the record at the time of plea that the appellant understood the charge and that there was a factual basis for it, the plea was accepted in violation of Rule 11.

North Carolina v. Alford, 400 U.S. 25 (1970), the only case cited by the Court below, is not in point. That case held only that under certain conditions it did not violate the Constitution for a state judge to accept a guilty plea when the defendant protested his innocence. Alford did not deal with the requirements of Rule 11, nor does this case involve an Alford situation.

CONCLUSION

The appellant's guilty plea should be withdrawn and appellant should be allowed to plead anew.

Respectfully submitted,

Metrick & Ostrow
Attorneys for Appellant

Of Counsel

Seymour Ostrow
Stephen Gillers

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Attorney for